NO. 73-1355

JUN 17 1974

MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

EDWARD FRANCIS KUNTZWEILER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR REHEARING AND WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT AND CERTIFICATE OF COUNSEL

MEMORANDUM FOR THE PETITIONER IN SUPPORT OF PETITION FOR REHEARING

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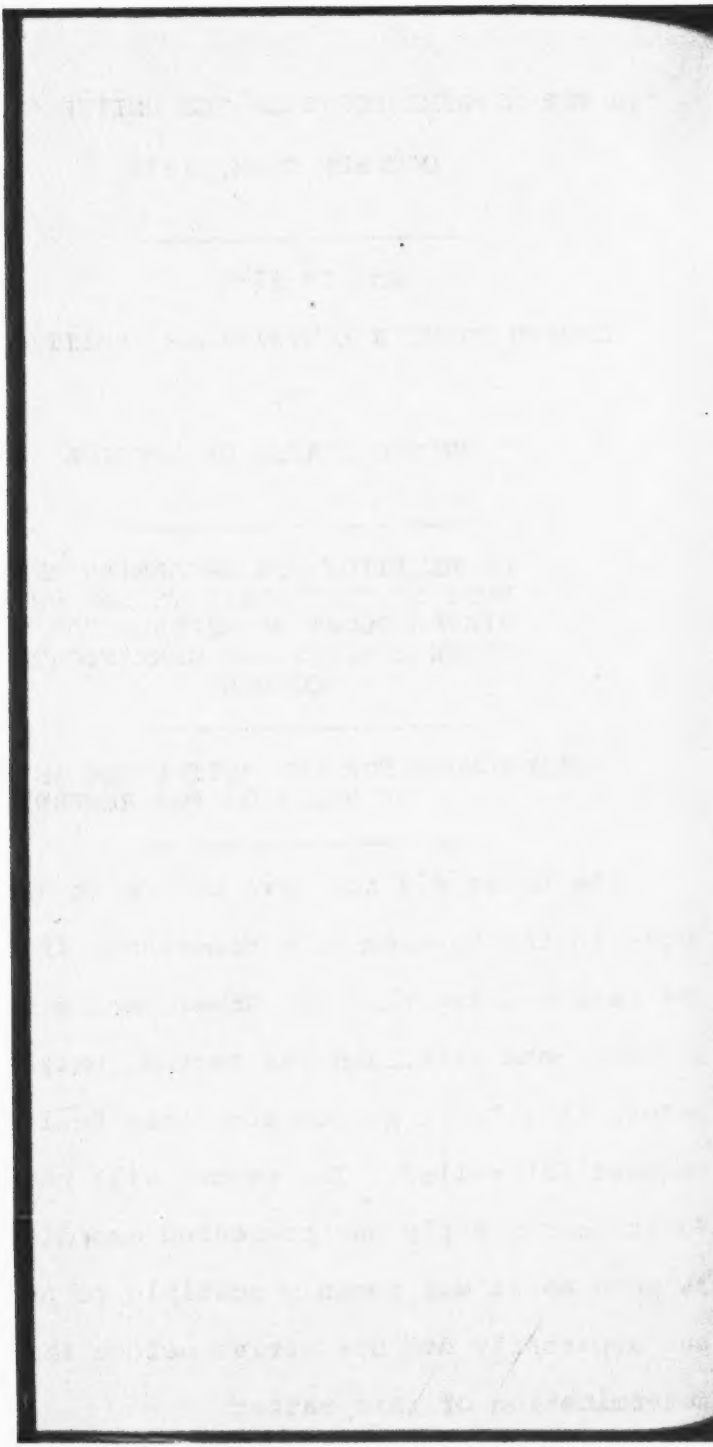
The Court did not have before it "Petitioner's Reply to the Government's Memorandum in Opposition. The reason being that the Government's response was untimely and late, and was served, only a few days before this Court passed upon this Petitioner's request for relief. The record will reveal that Petitioner's Reply was presented expeditiously and as soon as it was humanly possible to present same, but apparently did not arrive before the Court's determination of this matter.

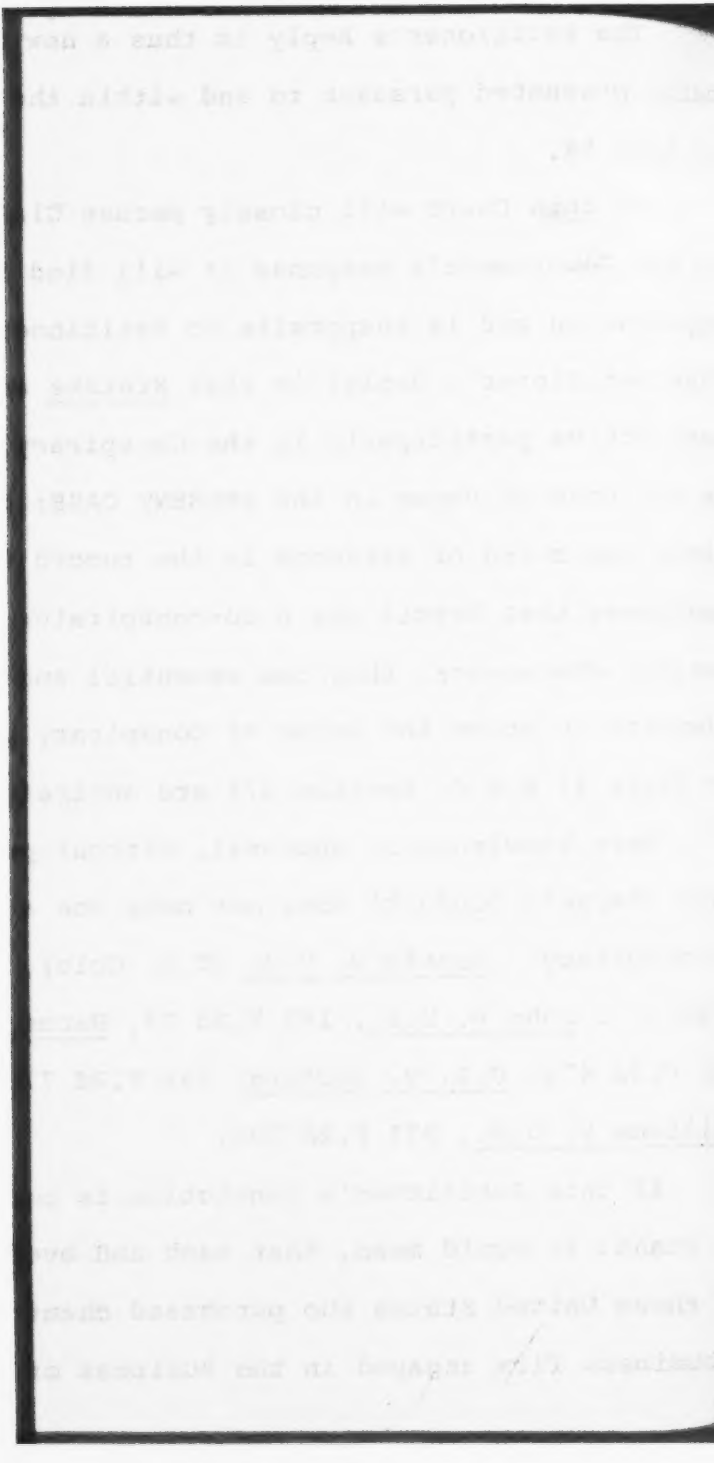


The Petitioner's Reply is thus a new matter being presented pursuant to and within the provisions of Rule 58.

If this Court will closely peruse Glasser cited in the Government's Response it will find it has no application and is inapposite to Petitioner's case (See Petitioner's Reply) in that Kretske and Roth were active participants in the Conspiracy, which is not true of Payne in the PRESENT CASE; nor is there one shred of evidence in the record in Payne's testimony that Brazil was a co-conspirator in any respect whatsoever, thus the essential and necessary elements to prove the Crime of Conspiracy pursuant to Title 21 N.S.C. Section 371 are entirely lacking.

Mere knowledge or approval, without participation (Payne's conduct) does not make one a party to a conspiracy. Dennis v. U.S. (C.A. Colo), 302 F.2d 5 , John v. U.S., 195 F.2d 77, Harms v. U.S., 272 F.2d 478, U.S. v. Shuford, 454 F.2d 772, Williams v. U.S., 271 F.2d 703.

If this Petitioner's conviction is permitted to stand, it would mean, that each and every citizen of these United States who purchased chemicals from a business firm engaged in the business of selling



same would become a conspirator with the Clerk of the Company who sold him such products.

The Government, relies heavily, upon the fact that Petitioner requested that the sales slips show that the sales were made for cash and Payne complied with this request, but the RECORD FURTHER UNEQUIVOCALLY REVEALS THAT AT THE TIME THIS REQUEST WAS MADE AND COMPLIED WITH, PAYNE HAD NO IDEA WHATSOEVER AS TO WHAT USE WOULD BE MADE OF THE CHEMICAL BEING PURCHASED FROM HIS COMPANY (Tr. 92). His testimony throughout the trial was that he could not state with certainty as to what use was going to be made of the products being purchased (Tr. 117, 118).

This Court has held on many an occasion in the past that there must be substantial evidence to sustain a conviction AND THERE IS NO EVIDENCE WHATSOEVER SUPPORTING PETITIONER'S CONVICTION OF CONSPIRACY IN THE CASE AT BAR. See Consolidated Edison Co. vs. Nat. Rel. Board 305 U.S. 197, 59 S. Ct. 206, 83 L. Ed. 126, the Court in defining what is substantial evidence stated:

> "It means such relevant evidence as a reasonable mind must accept as ADEQUATE TO ESTABLISH A CONCLUSION."

His conviction is wrongful and abortive and should be set aside and not permitted to stand.

Respectfully submitted,

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ANTHONY J. RAINERI
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CERTIFICATE OF COUNSEL

This Petition for Rehearing is presented in good faith and not for delay and is being made to afford the Court an opportunity to consider Petitioner's Reply to the Memorandum of the Government in Opposition.

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